IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

CHARLES W. HEFFELMAN, *Petitioner, et al.,*

v.

STEWART L. UDALL, Secretary of the Department of Interior of the United States, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Jess Larson, attorney for Charles W. Heffelman, petitioner herein, respectfully requests in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 24, 1967.

CITATIONS TO OPINIONS BELOW

The order of the District Court is unreported and is set out *infra* in the appendix hereto at page 1a. The opinion of the Circuit Court of Appeals is unreported and printed in the Appendix hereto at page 2a.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Does the United States District Court have jurisdiction to review determinations and orders of the Secretary of Interior pursuant to his statutory authority under Title 25 U.S. Code Section 373.

REGULATION INVOLVED

Regulations of the Secretary of Interior 25 C.F.R. § 15.10 (Revised as of January 1, 1958):

> § 15.10 *Examination of Witnesses.* All witnesses shall be examined under oath, and their testimony shall be reduced to writing. Any interested party may cross-examine any witness. Affidavits or depositions may be introduced in evidence if the affiants or deponents are present at the hearing and are available for cross-examination by interested parties, or if, in the case of depositions, interested parties have been given a reasonable opportunity to be present when the depositions were taken or to submit counter interrogatories to be answered by deponents.

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act, Title 5 U.S. Code Section 1009:

> (a) Any persons suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The Act of June 25, 1910, 36 Stat. 855, as amended, Title 25 U.S. Code Section 373:

> Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is lo-

cated: *Provided further,* That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also,* That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

"No person shall be . . . deprived of life, liberty or property without due process of law . . .".

STATEMENT

Petitioner brought this action to review, and set aside an order of respondent, Stewart L. Udall, Secretary of the Interior, as well as for a declaratory judgment and for injunctive relief.

The order challenged arose in the following manner. On June 16, 1962, Louise Wilson Heffelman, a Quapaw Indian and Unallottee, died testate.

Pursuant to the laws of the United States, the Bureau of Indian Affairs appointed a hearing examiner and hearings were held on September 12, 1962 and May 23, 1963. On December 13, 1963 the examiner issued an "Order Approving Will and Decreeing Dis-

tribution." The Last Will and Testament of deceased provided that if testator married subsequent to the date of execution, her husband was to receive one-third of her estate. The examiner rejected Petitioner's contention that he had become the common law husband of the deceased subsequent to the execution of the will. Accordingly, the examiner ordered distribution of the decedent's estate and did not allow petitioner to share as a named beneficiary under the will.

A Petition for Rehearing was denied by the examiner on February 20, 1964.

Thereafter, petitioner appealed to the Secretary of Interior, Bureau of Indian Affairs in Washington, D. C., requesting a rehearing and in the alternative, supplemental hearings to take additional evidence.

The several bases submitted to justify the petition included (1) the examiner's decision was contrary to the law of Oklahoma governing domestic relations, (2) the decision was not supported by substantial evidence on the record as a whole, (3) that the decision denied plaintiff due process of law in violation of the Fifth Amendment to the United States Constitution in that plaintiff was denied the right to cross-examine witnesses, to introduce relevant evidence contradicting and discrediting evidence adverse to him, (4) that the examiner was biased and abused his discretion throughout the administrative proceedings.

On March 1, 1966 petitioner's petition was denied and the "Order Approving the Will and Decreeing Distribution" was approved by the Secretary of the Interior. (Record pp. 13, 14.)

Thereafter, petitioner filed a complaint for review of and to set aside an administrative order; for declaratory judgment, and for injunctive relief in the United States District Court for the Northern District of Oklahoma. The complaint set forth in essence the preceding facts and incorporated an accompanying affidavit of counsel. This affidavit elaborated on one very important point. " . . . both the examiner and the Secretary of the Interior refused to hold supplemental hearings to take new evidence subsequently elicited from the file of the Department of the Interior's Bureau of Indian Affairs. That evidence was in the form of a letter from L. E. Dufford, Fiscal Accountant in the Department of the Interior, to Floyd Branson, the guardian of Louise Wilson Heffelman and showed conclusively that the Bureau of Indian Affairs in Quapaw, Oklahoma had knowledge of Louise Wilson Heffelman's marriage to Charles W. Heffelman." (Record p. 27) The affidavit concluded "that while the appeal of Charles W. Heffelman was pending before the Secretary of Interior during the period of March 1965 to March 1966, new evidence has come to light which makes it imperative that supplemental hearings be held." (Record p. 27).

The proceedings in the United States District Court for the Northern District of Oklahoma, Number 6402, Civil, were dismissed for lack of jurisdiction without any expressed ground therefore being presented in the order.

The order of the District Court was affirmed by the United States Court of Appeals for the Tenth Circuit, whose decision petitioner requests this Court to review on writ of certiorari.

REASONS FOR GRANTING WRIT

The decision of the court below assumes that section 10 of the Administrative Procedure Act constitutes an affirmative grant of jurisdiction with respect to the review of federal administrative actions. The same view is expressed both by the Second Circuit Court of Appeals in *Cappadora* v. *Celebrezzee*, 356 F. 2d 1 (1966) and the Ninth Circuit Court of Appeals in *Coleman* v. *United States*, 363 F. 2d 190 (1966), while a contra view is expressed by the Third Circuit Court of Appeals in *Local 542, International Union of Operating Engineers* v. *N.L.R.B.*, 328 F. 2d 850 (Cert. 1964 denied). However, by relying upon *Hanson* v. *Hoffman*, 113 F. 2d 780 (1940) as its authority, the court below reached a decision directly in conflict with the decision of the District of Columbia Circuit in *Homovich* v. *Chapman*, 191 F. 2d 761 (1951) and held that section 2 of the Act of June 25, 1910, *supra*, establishes the finality of the Secretary's determination of facts concerning property disposed of by will.

Further, the Tenth Circuit's resolution of the instant controversy is in direct conflict with the rationale of the decisions of *Hanson* v. *Hoffman, supra* and *Cappadora* v. *Celebrezzee, supra.*

In *Hanson, supra,* the Court of Appeals for the District of Columbia held that decisions by the Secretary of Interior with regard to wills under the statute in question here (Section 2 of Section 373 of Title 25 U.S. Code), is subject to judicial review under Section 10 of the Administrative Procedure Act. In *Cappadora, supra,* the Second Circuit Court of Appeals held that a somewhat similar decision by the Secretary of

Health, Education and Welfare was open to review and could be set aside if contrary to the standards of the Administrative Procedure Act.

CONCLUSION

In an appeal to the Circuit Court for the Tenth Circuit, Petitioner sought review of the District Court's ruling on jurisdiction. Petitioner has been denied his day in court to prove that he was denied procedural due process and that despite the ruling of the Secretary of Interior he knew or should have known that under Oklahoma law petitioner at all times has been the lawful common law husband of the deceased and as such is entitled under the will to one third of her estate. The District Court did not rule on the merits of petitioner's claim. The District Court ruled only that it did not have jurisdiction. No testimony was taken. The Circuit Court below has improperly attempted to affirm the District Court by a consideration of the merits of the controversy, which petitioner has been denied the right to litigate. This matter was not before the Circuit Court on its merits, only on the question of the jurisdiction of the District Court to proceed with a hearing on petitioner's petition. Wherefore, for all of the foregoing reasons petitioner believes there are special and important reasons embracing the proper

jurisdictional standards governing judicial review of administrative decisions.

Respectfully submitted,

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APPENDIX

[Filed June 16, 1966]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 6402 Civil

CHARLES W. HEFFELMAN, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Department of the Interior of the United States, *Defendant*.

Order

The court, having carefully considered the file in this case, and the briefs of the parties, has come to the conclusion that the Court does not have jurisdiction.

IT IS THEREFORE ORDERED that this cause be, and the same is hereby dismissed.

DATED this 16th day of June, 1966.

LUTHER BOHANON
United States District Judge

[Filed May 24, 1967]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1967.

No. 9057

CHARLES W. HEFFELMAN, *Appellant*,

v.

STEWART L. UDALL, Secretary of the Department of Interior of the United States, *Appellee*.

Appeal from the United States District Court for the Northern District of Oklahoma

Jess Larson (Urban A. Lester was with him on the brief) for Appellant.

John G. Gill, Jr. (Edwin L. Weisl, Jr., Assistant Attorney General, John M. Imel, United States Attorney, Hugh V. Schaefer, Assistant United States Attorney and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for Appellee.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

The primary question here presented is whether jurisdiction exists under section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, to permit judicial review of a decision of the Secretary of the Interior determining heirship to the restricted estate of an Indian. The district court dismissed the action for lack of jurisdiction and this appeal followed.

Appellant is a claimant to part of the restricted estate of Louise Wilson, an unallotted Quapaw Indian who died testate on June 16, 1962. Decedent, under the terms of a will executed with the approval of the Secretary, left her

estate to certain named persons with a proviso that in the event she remarried [1] her husband was to receive one-third of her estate. Appellant claims that he is the surviving husband of Louise Wilson through a valid common-law marriage existing at the date of her death. The Secretary, after a full evidentiary hearing, found from conflicting evidence and as a matter of ultimate fact that there had been no common-law marriage and designated distribution of the estate to the named beneficiaries. Appellant contends, among other things, that such finding is not based upon substantial evidence and is contrary to the laws of the State of Oklahoma and the United States.

As this court noted in Chournos v. United States, 335 F2 918, 919, approval apparently has been given judicial jurisdiction to entertain suits under section 10 of the Administrative Procedure Act to review decisions of the Secretary of the Interior in some instances where the aggrieved party has exhausted available administrative remedies. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 n. 7; Foster v. Seaton, D.C. Cir., 271 F2 836. The Act, however, is self-limiting and has no application where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." We must, then, turn to a consideration of the authority expressed or implied in the statutes pertaining to the Secretary's control over the distribution of restricted Indian estates.

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. §§ 372, 373, provides:

"Sec. 1. When any Indian to whom an allotment of land has been made, or may hereafter be made, dies

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[1] Decedent had been married four times when the will was executed in September 1952. She had divorced her fourth husband in June 1952. In her will, decedent bequeathed to her adopted son a remainder interest in all of her estate, subject to a life estate with a power of sale or disposal to the parents of her fourth husband.

before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, *the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.* If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may in his discretion, cause such lands to be sold * * *.

"Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided*

further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also*, That this section and section 372 of this title [section 1 of the Act] shall not apply to the Five Civilized Tribes or the Osage Indians." (Emphasis added.)

Appellant, although necessarily conceding that section 1 establishes the finality of the Secretary's determination of heirship under intestacy, argues that the determination of the Secretary in the case at bar was made under section 2 which contains no express limitations on judicial review when disposition of property is made by will and is thus, says appellant, subject to review under the Administrative Procedure Act. And, indeed, one circuit in reviewing the validity of an Indian will has so held. Homovich v. Chapman, D.C. Cir., 191 F2 761. On the other hand, that same court, in a case determining heirship where both testacy and intestacy were involved, has denied jurisdiction. Hayes v. Seaton, D.C. Cir., 270 F2 319. We are here, however, not concerned with a question of the validity of a will. The Secretary's determination in that respect is not disputed. Rather, we are urged to hold that the absence or presence of a will is the determinative premise upon which jurisdiction to review the Secretary's finding of a question of fact is dependent. To so hold, we believe, would reduce "the act of Congress [the Act of June 25, 1910] . . . to impotence by its contradictions." Blanset v. Cardin, 256 U.S. 319, 325. Certainly, if Louise Wilson had died in-

testate, the rejection of appellant's claim to heirship and the Secretary's finding would not be subject to judicial review. First Moon v. White Tail, 270 U.S. 243. While there may be legal distinctions to be drawn between the claim of an heir and the claim of a legatee, it would be illogical and contrary to the whole history of laws governing Indian property to ascribe to Congress by way of a negative inference an intention to provide the Secretary of the Interior with unfettered discretion on the one hand but not on the other. We think that as long as an Indian allotment remains subject to the Secretary's control, *cf.* Hanson v. Hoffman, 10 Cir., 113 F2 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act.

When judicial review of the merits of an administrative decision is denied by statute, such review does not become available through bolstering but conclusionary allegations in the complaint alleging the action of the administrative agency to be arbitrary and capricious, a denial of constitutional rights, or similar allegations. Such claims must be considered in view of the essence of the factual assertions and the content of the administrative decision. Schilling v. Rogers, 363 U.S. 666, 676. Here, appellant alleges that the administrative hearing was conducted in an arbitrary manner denying to him the right to introduce undesignated evidence and cross-examine undesignated witnesses upon matters affecting their credibility, and further that he was improperly denied a new hearing upon the grounds of newly discovered evidence. The administrative record, other than the decision (which indicates consideration of these allegations and concludes that appellant was afforded full opportunity to present his claims), is not before us. We thus conclude that the trial court properly held that

jurisdiction did not exist under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus, see Pottawatomie Tribe of Indians v. Udall, 10 Cir., 355 F2 364, 367); 28 U.S.C. § 1391(e) (venue); or 28 U.S.C. § 2201 (declaratory judgment).

The judgment is affirmed.